Supreme Court, U.S.
FILED
DEC 5 1996
CLERK

No. 96-550

In The

Supreme Court of the United States

October Term, 1996

SIGRID CHASE, DEBORAH CLEYMAN, JUDY GORDON, SULEMA R. VILLARREAL, ELVIRA HERRERA, SUSAN JEAN PRICE, SYLVIA GARZA, individually and in their representative capacities; BARBARA KNUTSON, DAVID EDWARD PEREZ, JOSEPH MANUEL PEREZ, JOHN PAUL PEREZ, DANIEL RICHARD PEREZ, individually; and ESTHER PEREZ, as next friend and guardian of JAMES PEREZ, a minor,

Petitioners,

vs.

LOCKHEED CORPORATION and GENERAL ELECTRIC CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MARK HICKS
Counsel of Record
HICKS, ANDERSON & BLUM, P.A.
Attorneys for Petitioners
100 N. Biscayne Boulevard
Suite 2402
Miami, Florida 33132
(305) 374-8171

HAGGARD, PARKS & STONE, P.A.

SPEISER, KRAUSE & MADOLE, P.C.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

LIST OF INTERESTED PARTIES

Petitioners refer the Court to the List of Parties and List of Interested Parties set forth, respectively, at pages ii and iii of the Petition for Writ of Certiorari, and page ii of Respondents' Brief in Opposition.

TABLE OF CONTENTS

Page

LIST OF INTERESTED PARTIES i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

I. ERRONEOUS APPLICATION OF *BOYLE* 1

II. UNCONSTITUTIONAL CHOICE OF LAW 5

CONCLUSION 10

TABLE OF CITATIONS

Page

CASES CITED

Allstate Ins. Co. v. Hague, 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) 7

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 1

Baltimore Football Club, Inc. v. Lockheed Corp., 525 F. Supp. 1206 (N.D. Ga. 1981) 9

Blane v. American Inventors Corp., 934 F. Supp. 903 (M.D. Tenn. 1996) 8, 9

Boyle v. United Technologies, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988) 4, 5

Brooks v. Eastern Air Lines, Inc., 253 F. Supp. 119 (N.D. Ga. 1966) 10

Campbell v. Arco Marine, Inc., 50 Cal. Rptr.2d 626 (Ct. App. 1996) 7

D.L. Thomas v. American Home Products, Inc., ___ U.S. ___, 117 S.Ct. 282, ___ L.Ed.2d ___ (1996) 6

In re Air Crash Disaster at John F. Kennedy Int., 407 F. Supp. 244 (Jud.Pan.Multi.Lit. 1976) 8

In re Prudential Secs. Inc. Limited Partnerships Lit., 930 F. Supp. 68 (S.D. N.Y. 1996) 7

In re Sundstrand Data Control, Inc., 443 F. Supp. 1019 (Jud.Pan.Multi.Lit. 1978) 8

In re Swine Flu Immunization Products, 446 F. Supp. 244 (Jud.Pan.Multi.Lit. 1978) 8

Jaurequi v. John Deere Co., 986 F.2d 170 (7th Cir. 1993) 6

TABLE OF CITATIONS – Continued

Page

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985).....6, 9

Reyno v. Piper Aircraft Co., 630 F.2d 149 (3d Cir. 1980), *rev'd on other grounds*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981).....9

Risdon Enterprises, Inc. v. Colemill Enterprises, Inc., 324 S.E.2d 738 (Ga. App. 1984).....9

Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976).....6

Soo Line Railroad Co. v. Overton, 992 F.2d 640 (7th Cir. 1993).....8

United States v. 105,800 Shares of Common Stock of Firstrock Bancorp., Inc., 825 F. Supp. 191 (N.D. Ill. 1993).....8

United States v. One Single Family Residence, 13 F.3d 1493 (11th Cir. 1994).....6

Wright v. Robinson, 426 S.E.2d 870 (Ga. 1993).....7

Yates v. Lowe, 348 S.E.2d 113 (Ga. App. 1986).....9

OTHER AUTHORITIES

Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 Cornell L.Rev. 94 (1976).....9

Sup. Ct. R. 10.....6

I.

ERRONEOUS APPLICATION OF *BOYLE*

The Fifth Circuit's decision upholds the summary judgments entered in favor of Respondents on all of Petitioners' claims. Respondents' defense of this decision ignores the settled rule that the facts and all reasonable inferences from the facts must be viewed in the light most favorable to the parties opposing summary judgment, Petitioners herein. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

For example, Respondents erroneously argue that there was no evidence that a single point electrical failure in one of the C-5A's thrust reversers led to an inadvertent and undetected deployment of a thrust reverser on take-off. (Respondents' Brief, at 11-12). Suffice it to say here that the district court itself expressly credited the Petitioners' theory of causation and the abundant expert testimony and other evidence submitted by Petitioners on this point:

> *Plaintiffs have presented affidavit and deposition testimony which indicates that the accident may have been caused by the design of the parts contained in ECP 7054.*
>
> * * *
>
> The ground wires for both the thrust reverser enunciator circuit and the thrust reverser indicator lights circuit were terminated to a single ground point. Consequently, *if that single point malfunctioned, the thrust reverser system could remain in an unlocked position without the cockpit crew being aware of it, which could in turn lead to an uncommanded deployment of the system.*
>
> * * *
>
> *Plaintiffs* also assert that the single point ground design of the thrust reverser system caused the crash and *have provided evidence of this.*

(R. 2404-2406).[1] Respondents' "no causation" argument simply does not bear scrutiny on this record.[2]

Respondents likewise improperly slant the summary judgment record in their favor in arguing that the evidence was supposedly "unrebutted" that the challenged single point ground design "complied with specifications provided or approved by the Air Force . . . ," that Lockheed did not alter GE's original design, and that the testimony from GE's witnesses which Petitioners refer to in the Petition relate to a different part of the C-5A's electrical system. (Respondents' Brief, at 12-13, 20).

As was explained in the Petition, GE originally designed the thrust reversers with *two* separate grounds for the enunciator and indicator circuits precisely to avoid a single point failure. However, Lockheed inexplicably attached the two ground wires for the two circuits to a *single* grounding stud when it assembled the crash aircraft and other C-5A's. (Petition, at 4-5, 7-8). Contrary to Respondents' unsupported assertions, the evidence on this issue was crystal clear.

William Gullick, a former GE employee who also was retained as one of its experts in this case, responded as follows to Petitioners' contention that the single point ground design was defective:

> Criticism has been made of the fact that pins 1 and 2 are grounded at the same grounding stud. *The [GE] design of the thrust reverser control system did not contain a common ground but instead specified dual grounds, one for the operating [enunciator] circuit and one for the indicating circuit.*

(R. 940).

Dr. Fred Gilliam, another GE expert, echoed Mr. Gullick's testimony that Lockheed had in fact altered GE's

---

[1] All emphasis has been supplied by counsel.

[2] For that matter, even the Air Force believed that a single point failure caused the crash. (R. 2175, reverse side; 2179; 2189, reverse side).

original design of this crucial safety feature and further suggested that Lockheed's alteration violated the specifications:

> The only qualification relevant to the conclusion of the preceding paragraph [i.e., that the design was "in full compliance with each set of specifications"] involves the *"as installed"* electrical system and the *variance* between it and the electrical system as designed by GE. *Combining the ground wire for the solenoid [enunciator] circuit with the ground wire for the thrust reverser indicator lights circuit at a point between the pylon connector and the engine connector creates a "common ground" for these two circuits. This common ground was not part of General Electric's design for the thrust reverser system. I don't know the rationale for creating this common ground, but the apparent result is a reduction in the fault tolerance of the system.*

(R. 947-48).

This evidence, of course, is in complete accord with GE's post-accident letter to the Air Force regarding GE's original dual ground design and Lockheed's unilateral alteration of the same (quoted at page 16 of the Petition), as well as the following deposition testimony from the author of that letter:

> Q . . . Was GE required to design the electrical system of the thrust reverser system so that it would not have a single point failure mechanism in it?
>
> A It stated – we met the design requirements as specified in that particular document [i.e., Specification 41060].
>
> * * *
>
> Q I'm only interested, sir, as to single point failure mechanisms. You complied with that – that was a prohibition by the specifications, was it not?

A Yes.

* * *

Q . . . I want you to assume that General Electric had designed – pursuant to 41060 had designed a system, this system we've been talking about, which provided for two wires to one ground for the thrust reverser indication lights. Would that be a violation of the safety provisions of this particular contract?

A In my opinion, if we run two circuits into one ground pin, it would have been a violation of the requirements of this document.

* * *

If we [GE] provided and hooked up both of them into one pin, in my opinion we would not have met the specification as its written in the spec.

(Petitioners' App., at 37-40).

GE witnesses furthermore testified that GE did not learn until after the C-5A crashed that Lockheed had altered GE's original dual ground design which complied with the governing specifications (Petitioners' App., at 42, 46), and there was no evidence that Lockheed had informed the Air Force of its decision to change GE's design.

The evidence on summary judgment thus was that a single point ground failure caused the crash of the C-5A, GE's original design of the thrust reverser's electrical circuitry included dual grounds to prevent such a failure, Lockheed altered GE's original design without telling either GE or the Air Force, and Lockheed's alteration violated the governing specifications.

In light of the foregoing, Respondents' contention that the Fifth Circuit's application of the government contractor defense is consistent with *Boyle v. United Technologies*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), collapses along with the faulty foundation upon which it is based. The government contractor defense is

rooted in governmental exercise of *discretion*. (See Petition, at 10-19). The Fifth Circuit's conclusion that *Boyle's* first condition was met should not be permitted to stand since there was no evidence that the Air Force substantively reviewed and thereafter approved Lockheed's design of the thrust reverser's electrical circuitry knowing that Lockheed had altered GE's design. The Fifth Circuit's conclusion that *Boyle's* second condition was met should not be permitted to stand because Lockheed's altered design did not comply with the governing specifications. The Fifth Circuit's conclusion that *Boyle's* third condition was met should not be permitted to stand because there was no evidence that Lockheed informed the Air Force, prior to the crash, that Lockheed had altered GE's original design which complied with the specifications. (See Petition, at 12-19). The Petition should be granted.

II.

UNCONSTITUTIONAL CHOICE OF LAW

Respondents' arguments on the lower courts' choice of law are without merit and also fail to address the central issue under this point this point – i.e., whether the *total lack of contacts* between Petitioners and their decedents and the state of Georgia rendered the choice and application of Georgia law fundamentally unfair. As previously detailed, the Fourteenth Amendment's due process clause surely prohibits the choice of law of a state with which the adversely affected party has no contacts whatsoever. (Petition, at 20-23). Because this constitutional question was decided below in a way that conflicts with decisions of this Court, or the law is in dire need of further clarification, the Petition should be granted.

Respondents make a number of unsupported assertions before engaging in their superficial analysis of the choice of law issues. Respondents' contention that Petitioners waived their due process argument is untenable

for a myriad of reasons. First, Petitioners specifically raised the issue in the district court and then again on appeal. (R. 2370). Second, constitutional fairness is part and parcel of any choice of law analysis and was preserved by Petitioners' timely opposition to Respondents' motion to apply Georgia law. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-823, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Jaurequi v. John Deere Co.*, 986 F.2d 170, 173 (7th Cir. 1993). Third, the Fifth Circuit expressly acknowledged in its opinion that the "most significant relationship" test adopted in Texas and Florida is *"subject to constitutional constraints."* (Petitioners' App., at 16). Fourth, because a pure question of law is involved, appellate courts maintain discretion to address the matter and especially where the deprivation of constitutional rights results in a miscarriage of justice. *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *United States v. One Single Family Residence*, 13 F.3d 1493, 1498 (11th Cir. 1994). And fifth, this Court clearly has discretion to consider the due process issue in deciding whether to grant the Petition. *D.L. Thomas v. American Home Products, Inc.*, ___ U.S. ___, 117 S.Ct. 282, 283, ___ L.Ed.2d ___ (1996) (J. Scalia, concurring); Sup. Ct. R. 10.

Respondents' characterizations of the evidence and the Fifth Circuit's choice of law holdings are similarly flawed. It is undisputed that the *prototype* pylon kit used in kit proofing the crash aircraft and other C-5A's was directly delivered to the Air Force in Texas and not Georgia. (R. 706). Further, and significantly, nowhere on the face of the Fifth Circuit's opinion does the court hold that Petitioners' strict liability and negligence claims are governed by and barred by the Georgia statute of repose. Under part III of the opinion, the only stated basis for the affirmance of the dismissal of these claims was the government contractor defense. Because Petitioners' failure to warn claims survived this immunity defense, the Fifth Circuit under part IV of the opinion determined which

state's law applied to the failure to warn claims.[3] There is no discussion in the Fifth Circuit's choice of law analysis regarding Georgia's statute of repose or any alleged Georgia state interest in that enactment which, on its face, does not apply to extra-territorial accidents and which, pursuant to the *lex loci* test, has never been applied by Georgia courts to actions for injuries sustained outside of Georgia. (Petitioners' App., at 17-18). Ga. Code Ann. §51-1-11.

To the extent the Fifth Circuit's opinion could somehow be interpreted as sanctioning the choice and application of Georgia's statute of repose to "destroy" Petitioners' product liability actions, however, the deprivation of Petitioners' due process rights is even more glaring. *Wright v. Robinson*, 426 S.E.2d 870, 872 (Ga. 1993). Based on the choice of law constraints set forth in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981), lower courts have consistently found it unconstitutional to apply a state statute to a party who has no connection or contacts with that state. *E.g., In re Prudential Secs. Inc. Limited Partnerships Lit.*, 930 F. Supp. 68, 83 (S.D. N.Y. 1996); *Campbell v. Arco Marine, Inc.*, 50 Cal. Rptr.2d 626, 632 (Ct. App. 1996). Here, the Georgia statute of repose did not even exist at the time Respondents originally manufactured, designed and sold the C-5A to the Air Force. Georgia's domestic legislation cannot be applied to Petitioners' claims without abrogating the most fundamental of due process rights.

Respondents' additional argument that application of the "most significant relationship" test "automatically provides the requisite guarantees under due process" is equally unconvincing. Following Respondents' logic, once a court properly enunciates this test, the actual choice and application of law thereunder can never be

---

[3] The Fifth Circuit had noted earlier that the district court erroneously found that the Georgia statute of repose barred the failure to warn claims. (Petitioners' App., at 7 n.6).

constitutionally challenged. Clearly, the due process constraints must be separately considered. *See Blane v. American Inventors Corp.*, 934 F. Supp. 903, 909-910 (M.D. Tenn. 1996) (analyzing constitutionality of applying Tennessee law after court chose that state's law under "most significant relationship" test); *see also Soo Line Railroad Co. v. Overton*, 992 F.2d 640, 643-645 (7th Cir. 1993) (finding application of Minnesota law unconstitutional even though choice of law analysis satisfied state rules); *United States v. 105,800 Shares of Common Stock of Firstrock Bancorp., Inc.*, 825 F. Supp. 191, 193-194 (N.D. Ill. 1993) (finding imposition of Delaware law unconstitutional even if state conflict-of-law rules dictate that Delaware law governs).

Respondents' contention that Petitioners do not directly challenge the lower courts' determination that Georgia had the "most significant relationship" is both incorrect and irrelevant. Petitioners have demonstrated in great detail that Texas had far and away the most significant contacts and state interests to the parties and occurrences in this case. (Petition, at 26-27). Indeed, Respondents conveniently ignore that Respondents themselves moved to consolidate and transfer these cases to *Texas* precisely because of Texas' significant contacts. 28 U.S.C. §1407(a). Respondents had every opportunity to transfer the action to a Georgia district court if they truly believed Georgia had the most substantial nexus to the issues in this action.[4]

In any event, the federal issue which this Court can and should decide is not whether the lower court chose

---

[4] *See In re Swine Flu Immunization Products*, 446 F. Supp. 244, 247 (Jud.Pan.Multi.Lit. 1978); *In re Sundstrand Data Control, Inc.*, 443 F. Supp. 1019, 1021 (Jud.Pan.Multi.Lit. 1978); *In re Air Crash Disaster at John F. Kennedy Int.*, 407 F. Supp. 244, 245 (Jud. Pan.Multi.Lit. 1976) (all transferring cases to districts where no action was pending since transferee districts had greatest connection to cases).

the correct law under the applicable state choice of law rules but whether the choice of Georgia law exceeded constitutional limitations. And on this point, Respondents fail to grasp – and indeed have wholly failed to address – that due process requires that the adversely affected party have some contacts with the state whose law is chosen. As the text writers have put it, the chosen state must have "legislative jurisdiction." (Petition, at 20-26). *See also Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 165 n.56 (3d Cir. 1980), *rev'd on other grounds*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) (citing "Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 Cornell L.Rev. 94, 103 (1976) (forum must have reasonable due process basis for applying own law, which does not exist if party opposing application of forum's law has no minimum contacts with forum. . . . ")); *cf. Blane*, 934 F. Supp. at 910 (finding application of Tennessee law constitutional where adversely affected parties had direct and adequate contacts with Tennessee).

Finally, Respondents' speculative assertions regarding Georgia's *lex loci delicti* doctrine and German law miss the mark entirely. That Georgia courts undoubtedly would have rejected the application of Georgia substantive law (including the statute of repose) had Petitioners filed suit there demonstrates the lack of any "state interest" under this Court's due process analysis. *See Phillips*, 472 U.S. at 818. Respondents' argument that it is "far from clear" whether Georgia law would have been applied due to the "public policy exception" also is unavailing. Georgia courts have consistently held that extra-territorial airplane crashes are not governed by substantive Georgia law and irrespective of whether Georgia law would have provided immunity.[5] Respondents have

---

[5] *See Yates v. Lowe*, 348 S.E.2d 113, 113-114 (Ga. App. 1986); *Risdon Enterprises, Inc. v. Colemill Enterprises, Inc.*, 324 S.E.2d 738, 740-741 (Ga. App. 1984) (distinguishing *Baltimore Football Club, Inc. v. Lockheed Corp.*, 525 F. Supp. 1206 (N.D. Ga. 1981)); *see*

failed to cite a single case which has not followed the *lex loci* test. Further, Respondents' suggestion that German law may not provide an injured party with a strict liability claim hardly supports use of the public policy exception. Since Georgia's statute of repose altogether nullifies a plaintiff's cause of action, German law undoubtedly could not be any more restrictive or harsh.

CONCLUSION

Based on the facts and authorities set forth herein and in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

MARK HICKS
Counsel of Record
HICKS, ANDERSON & BLUM, P.A.
Attorneys for Petitioners
100 N. Biscayne Boulevard
Suite 2402
Miami, Florida 33132
(305) 374-8171

HAGGARD, PARKS & STONE, P.A.

SPEISER, KRAUSE & MADOLE, P.C.

---

also Brooks v. Eastern Air Lines, Inc., 253 F. Supp. 119, 120-121 (N.D. Ga. 1966).